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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 543

CHARLES W. POSEY, *Petitioner,*

v.

CLARK EQUIPMENT COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinion Below

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 409 F.2d 560 and is attached as Appendix A to the petition. The district court's opinion from the bench is unreported but is included in the record (Tr. 410-415).

Jurisdiction

Petitioner states no basis for this Court's jurisdiction to review the judgment of the court below, but presumably he seeks to invoke the Court's jurisdiction under 28 U.S.C. 1254(1).

Question Presented

The question as stated by petitioner (Petition, at 2) is not presented by this case. In our view, the only question presented by the opinion and judgment of the court below is whether that court correctly applied the products liability law of Indiana in agreeing with the district court that there was no evidence upon which a jury could render a verdict for petitioner, and, thus, that a directed verdict for respondent was proper.

Statement of the Case

This diversity action arose out of injuries sustained by petitioner when, in the operation of a fork lift truck sold by respondent to petitioner's employer, he accidentally dislodged a stack of heavy cartons, one of which fell on him. Petitioner's claim was based upon alleged negligence, breach of implied warranty, and strict liability of respondent as manufacturer and seller of the fork lift truck, in that the truck was not equipped with an overhead canopy guard or with a warning that the absence of such a guard subjected the operator to likelihood of injury from falling objects when the truck was operated in areas where objects were stacked higher than the operator's head. Petitioner made no claim that the presence or absence of an overhead guard had any relationship to the likelihood of accidents, but only that, in the event of accidents in "high-stack" areas, falling materials would strike the guard rather than the operator if the truck were equipped with a guard.

The evidence established that the fork lift truck at issue was designed by respondent so that, without an overhead guard, it could enter areas such as street trucks and trailers with low head-room. The truck was, however, capable of lifting loads to any height up to almost nine feet. It was equipped to be fitted with an overhead guard, which could

be purchased as an optional accessory for about $90 and could be installed in about ten minutes. The salesman representing the independent dealer who sold the truck to petitioner's employer, AAA Warehouse Company, discussed the question of an overhead guard with AAA's executive officer, but AAA ordered no guard because the overall height of the truck would then be too great to permit its entry "into all the street trucks and trailers that frequented his dock." (Tr. 112; see also Tr. 110-111, 119-120)

Petitioner introduced expert testimony to the effect that fork lift trucks should be equipped with overhead guards when used in high stack areas, and the court below stated that there was evidence that an overhead guard should be used when a fork lift truck is used to lift objects above the operator's head (Appendix A to petition, at 4). The evidence also established that petitioner was an experienced fork lift truck operator who had been employed in industry all of his adult life (Petition, at 3), and that a "fork lift truck operator, moving his heavy duty machine in and around stacks of merchandise, is always subject to bumping a stack." (Petition, at 12). Petitioner testified on cross examination that, at the time of the accident, he was aware that he was operating in an area of high-stacked cartons and that cartons at the top of the stacks might fall at any time if they were bumped. (Tr. 80.) No evidence was introduced by petitioner to the effect that he was unaware that a falling object was more likely to injure an operator of a truck not equipped with a guard than an operator of a truck equipped with a guard.[1]

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[1] Petitioner contended in his petition for rehearing in the court below that he would have introduced evidence on that issue had he realized that this case would not be controlled by a decision of the Third Circuit. See pp. 6-7, *infra*. (Petition for Rehearing, pp. 5-6.) It is difficult to conceive what that evidence would have been, since, as the district court found, petitioner "was a man of many years' experience in the use of these machines and readily admitted [in his testimony] that he knew of the danger involved." (Tr. 413).

At the close of all the evidence, the district court granted respondent's motion for a directed verdict under F.R. Civ. P. 50(a), concluding "that the danger of an object falling upon an unprotected operator was so obvious that the user of the truck would reasonably be expected to know about it." (Appendix A to petition, at 6.) The court below affirmed. It found first that, under Indiana law, in the absence of privity of contract, "[a]lthough a manufacturer who has actual or constructive knowledge of an *unobvious* danger in the use of his product is subject to liability for negligence for failure to warn users of the danger, he has no duty to warn if the danger be *obvious*." (Appendix A to Petition, at 7; emphasis added.) It found also that "it would be obvious to anyone who thought about it" that a falling object would endanger the operator of a fork lift that was not equipped with an overhead guard to protect him (Appendix A to Petition, at 5), and it thus held that, as a matter of law, respondent had no duty to supply a warning notice of such a danger (Appendix A to Petition, at 9).

Petitioner filed a petition for rehearing, which was denied without opinion on June 4, 1969. Neither in that petition, however, nor in any other papers or arguments prior to his petition for certiorari, did petitioner contend that he was deprived of any rights under the federal (or the Indiana) Constitution.

Argument

The single question presented by petitioner is whether an employee is deprived of due process of law by a decision "which compels him, as a condition of his continuing employment, to forfeit any right of action against the manufacturer of a negligently designed and unguarded machine which injures him" through no fault of his own. (Petition, at 2.) Petitioner concedes that his question is not presented by the language of the opinion of the court below (Petition,

at 19.) Neither that question nor any of petitioner's arguments as to an alleged deprivation of due process of law or trial by jury [2] were presented by him at any stage prior to the filing of his petition for certiorari, and the record provides no support for the premises in his question.[3] In those circumstances, we submit that this is a particularly inappropriate vehicle for the exercise of this Court's supervisory power over the federal courts.

In fact, this case presents only the question whether the two courts below correctly applied Indiana products liability law in determining that a manufacturer has no duty to warn a user of an obvious danger, that the danger here was obvious, and that, therefore, there was no issue to be presented to the jury. Petitioner points to no authorities indicating that the courts here incorrectly applied Indiana law, and the decision below is consistent with the decisions of federal and state courts applying Indiana law in the area of products liability. See, *e.g.*, *Schemel* v. *General Motors*

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[2] Though the issue appears not to be included within the question presented by petitioner, he does comment in his conclusion that he was unconstitutionally deprived of a trial by jury (Petition, at 18). He gives no explanation for his contention, citing only a case in which a court of appeals had rejected a jury's specific finding as to the reasonableness of certain conduct. *International Co.* v. *Nederl. Amerik.*, 393 U.S. 74 (1968). Since petitioner admittedly introduced no evidence from which a jury might conclude that the danger to him was not an obvious one, he must be contending that he was, in all events, entitled to a jury trial—*i.e.*, that there can be no directed verdicts in civil cases. That proposition is, of course, without merit. See, *e.g.*, *Galloway* v. *United States*, 319 U.S. 372 (1943); *Helene Curtis Industries, Inc.* v. *Pruitt*, 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968).

[3] The only evidence on the issue of the appropriateness of overhead guards related to the use of fork lift trucks in high stack areas, and it was uncontroverted that the presence of a guard was unnecessary in many circumstances and hazardous in some circumstances. (Tr. 212). As to the compulsion upon petitioner, there is no suggestion in the record that petitioner complained about the absence of a guard, that he would have complained but for a fear of discipline or loss of employment, or that he would have had any basis for such a fear.

Corporation, 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); *Evans* v. *General Motors Corporation*, 359 F.2d 822 (7th Cir. 1966), *cert. denied*, 383 U.S. 836 (1966); *Blunk* v. *Allis-Chalmers Manufacturing Company*, 242 N.E. 2d 122 (Ind. 1968); *Strickler* v. *Sloan*, 141 N.E. 2d 863 (Ind. 1957). Petitioner points to no evidence from which a jury could possibly have concluded that the danger of a falling object injuring him was not obvious. To the contrary, he admitted at the trial the obviousness to him of the danger of falling objects, see p. 3, *supra*, and he admitted in his petition for rehearing below that he failed at the trial to introduce any evidence to the contrary. See p. 3, n. 1, *supra*.

Petitioner's contention that the decision of the court below is in conflict with the Third Circuit's decision in *Brandon* v. *Yale & Towne Manufacturing Co.*, 342 F.2d 519 (1965), is without substance. *Brandon* was governed by Maryland law, and the court affirmed the district court's denial of a judgment notwithstanding the verdict under F.R. Civ. P. 50(b), the district court having relied (though the Third Circuit did not) in large part upon the defendant's failure to preserve that motion in that it made no motion for a directed verdict at the close of all the evidence. See 220 F. Supp. 855, 857 (E.D. Pa.).

Apart from the difference in the procedural posture and in the applicable law, *Brandon's* facts differed substantially from those here, as the court below noted. (See Appendix A to Petition, at 9-10). The fork lift truck involved in *Brandon* had a substantially higher lift capacity than the truck at issue here, and was sold to the employer for use as a "high stacking" machine.[4] See 220 F. Supp. at 858. The manufacturer in *Brandon* agreed to provide a truck

[4] We note that the district court in *Brandon* relied upon the American Standards Association Code for the Operation of Industrial Power Trucks, which provided that overhead canopy guards were mandatory

equipped with an overhead guard, and, when he failed to do so, the employer called him to point out that failure. These facts are in sharp contrast to the situation here, as the court below recognized.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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except that "'[w]here the overall height of the truck with forks in lowered position is limited by headroom conditions and there is insufficient space for the operator to assume a normal driving position, such canopy guards may be omitted.'" 220 F. Supp., at 858, n.2.